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ABSTRACT

Race-conscious affirmative action programs in higher education are subject to strict scrutiny, which is the highest standard of review used by the courts to evaluate a policy's constitutionality. The courts employ a two-part test, examining whether the policy serves a compelling governmental interest (the underlying goal of the policy must be especially important and must be supported by sufficient evidence) and whether the policy is narrowly tailored to satisfy that interest (the policy is necessary to achieve the compelling interest and there are no race-neutral or less burdensome alternatives that could achieve the same interest). Institutions of higher education have advanced two types of compelling interests to justify their race-conscious admissions and financial aid policies: promoting educational diversity and remedying the present effects of past discrimination. The narrow tailoring requirement tests the fit between a compelling governmental interest and the policy adopted to satisfy that interest. The courts evaluate whether a race-conscious policy is necessary to achieve the compelling interest and examine policies that are race-neutral or less burdensome on non-minority students. The paper examines the current state of the law, evidence from the university, and questions in the law. (SM)

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Constitutional Requirements for Affirmative Action in Higher Education Admissions and Financial Aid.

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CONSTITUTIONAL REQUIREMENTS FOR AFFIRMATIVE ACTION IN HIGHER EDUCATION ADMISSIONS AND FINANCIAL AID

Race-conscious affirmative action programs in higher education are subject to "strict scrutiny," which is the highest standard of review used by the courts to evaluate a policy's constitutionality. The courts employ a two-part test: **First, does the policy serve a "compelling governmental interest"?** This means that the underlying goal of the policy must be especially important and must be supported by sufficient evidence. **Second, is the policy "narrowly tailored" to satisfy that interest?** This means that, among other things, the policy is necessary to achieve the compelling interest and there are no race-neutral or less burdensome alternatives that could achieve the same interest. The different elements of the strict scrutiny test are discussed below.

COMPELLING INTERESTS

Institutions of higher education have advanced two types of compelling interests to justify their race-conscious admissions and financial aid policies:

- promoting educational diversity
- remedying the present effects of past discrimination

These interests are not mutually exclusive, and some schools articulate both interests as justifications for their race-conscious programs. A "strong basis in evidence" is usually required to justify a compelling interest in race-based affirmative action cases, although it is not clear from the case law what types of evidence are necessary or sufficient to satisfy the "strong basis in evidence" requirement.

A. "PROMOTING EDUCATIONAL DIVERSITY"

1. Current State of the Law

a. Regents of the University of California v. Bakke. The concept of promoting "educational diversity" as a compelling interest has its origins in Justice Powell's opinion in *Bakke*. Casting the deciding vote for a badly fragmented U.S. Supreme Court, Justice Powell ruled that a medical school admissions policy which reserved exclusive seats for minority applicants was illegal, but held that race could be used as a factor in admissions. The critical passages in Justice Powell's opinion state:

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> Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a University to make its own judgments as to education includes the selection of its student body. . . . [A]t the graduate level, our tradition and experience lend support to the view that the contribution of diversity is substantial. . . . Ethnic diversity, however, is only one element of a range of factors a university may properly consider in attaining the goal of a heterogeneous student body. . . . The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial and ethnic origin is but a single though important element.

While Justice Powell's opinion supports the non-remedial use of race to promote a diverse student body, there are two important limitations in the opinion. First, "educational diversity" finds protection within the scope of traditional academic freedoms associated with the First Amendment, which may limit the opinion's use in non-university settings. Second, the opinion does not hold that promoting *racial* diversity is itself a compelling interest; rather racial and ethnic diversity are only one part of an interest in promoting a generally diverse student body.

b. Post-*Bakke* Treatment of Diversity. Since *Bakke*, the U.S. Supreme Court has has not ruled on whether a non-remedial interest can be a compelling interest under a strict scrutiny analysis. The Court is likely to revisit *Bakke* because of conflicts among the lower federal courts at the both the court of appeals level and the trial court level:

Conflicts in the Courts of Appeals

In 1996, the Fifth Circuit ruled in ***Hopwood v. Texas*** that the University of Texas Law School's race-conscious admissions policy was unconstitutional and that promoting educational diversity is not a compelling interest. The *Hopwood* court held that Justice Powell's opinion was not binding precedent and that U.S. Supreme Court case law since the *Bakke* decision only recognized remedial interests as compelling interests. (The University also argued that it had an interest in remedying the present effects of past discrimination, but the court found the evidence insufficient.)

However, in ***Smith v. University of Washington Law School,*** the Ninth Circuit upheld the promotion of diversity as a compelling interest, ruling in late 2000 that Justice Powell's opinion in *Bakke* is binding precedent and that *Bakke* has not been overruled by later case law. The U.S. Supreme Court declined to take the appeal of the case.

In ***Johnson v. Board of Regents of the University of Georgia,*** the Eleventh Circuit struck down a diversity-based admissions policy as unconstitutional and suggested that Justice Powell's *Bakke* opinion is not binding precedent. However, the court assumed, without deciding the issue, that promoting diversity could be a compelling interest; the court then proceeded to strike down the admissions policy because it was not narrowly tailored to promote the interest in diversity.

Conflicts in the District Courts

In December 2000, the district court in ***Gratz v. Bollinger*** upheld the University of Michigan's current undergraduate admissions policy, which uses race as a "plus" factor in a point allocation system. The court held that Justice Powell's *Bakke* opinion had not been overruled and that there was sufficient evidence regarding the educational benefits of a diverse student body to support a ruling that diversity is a compelling interest. The case is on appeal to the Sixth Circuit.

In March 2001, the district court in ***Grutter v. Bollinger*** struck down the University of Michigan Law School's admissions policy, which employs race as a plus factor in a individualized, whole-file review system. The court held that Justice Powell's *Bakke* opinion in not binding and that diversity is not a compelling interest. The court also held that the policy was not narrowly tailored. On April 5, 2001, the Sixth Circuit granted a stay preventing the district court's injunction against the law school from going into effect pending the appeal of the case. The appeal is pending in the Sixth Circuit.

Related Cases

In the **K-12 context,** courts of appeals for the First Circuit and the Fourth Circuit have assumed for the sake of argument that *Bakke* remains good law and that promoting diversity is a compelling interest. (*Wessman v. Gittens; Tuttle v. Arlington County School Board; Eisenberg v. Montgomery County Public Schools*) These courts have nevertheless struck down race-conscious student admissions and transfer policies on narrow tailoring grounds.

Outside of the educational admissions area, some courts of appeals have rejected diversity as a compelling interest. In *Taxman v. Board of Education of the Township of Piscataway*, the Third Circuit ruled that diversity did not provide a compelling justification for using race to make a termination decision between two employees. In *Lutheran Church-Missouri Synod v. Federal Communications Commission*, the D.C. Circuit held that diversity in programming was not a compelling interest sufficient to justify a licensing program that encouraged stations to maintain a workforce that mirrored the racial composition of surrounding communities.

2. Evidence from the University

While the courts have provided little guidance on the nature and quantity of evidence required to satisfy a "strong basis in evidence" requirement, evidence introduced in most cases involving educational diversity has taken two general forms: (1) **anecdotal and testimonial evidence** by educators, administrators, professors, and students expressing the value of diversity, and (2) **empirical and social science evidence** demonstrating the educational benefits of a diverse student body. Although both types of evidence are acceptable, recent court decisions suggest that the courts expect significant empirical evidence to support a holding that promoting diversity is a compelling interest.

Example: In ruling that promoting diversity is not compelling, the district court in the University of Georgia case was influenced by the university's inability to provide sufficient evidence to demonstrate the benefits of diversity. Finding the testimony of the former president

of the university system to be unpersuasive, the court noted that he "support[ed] his speculations with data no more quantifiable than his years of teaching/administrative experience."

On the other hand, the district court in the University of Michigan undergraduate case found social science evidence to be persuasive because it suggested that (1) students learn better in a diverse environment, (2) students are better prepared to be active participants in a pluralistic society, and (3) diversity serves to break down historical patterns of racial segregation. The court relied heavily on the report of an expert witness based at the University of Michigan who employed three sources of data:

- multi-institutional national data
- survey data of students at the University of Michigan
- data drawn from a specific classroom program at the University of Michigan

The court also relied on information and social science studies in amicus curiae briefs which suggested that diversity produces a richer educational experience for students. It is not clear, however, whether the extensive amount of particularized data introduced in the University of Michigan undergraduate case is required for each college or university to justify diversity on its own campus, or if multi-institutional evidence and evidence from other campuses will suffice.

Nevertheless, because the question of whether promoting diversity is a compelling interest is ultimately a question of law, courts may choose to ignore social science evidence of the benefits of diversity. The district court in *Grutter v. Bollinger*, the University of Michigan Law School case, found that diversity might provide educational and societal benefits, but still held as a matter of law that promoting diversity was not a compelling interest.

3. Questions in the Law

It remains uncertain whether the U.S. Supreme Court will revisit *Bakke* and clarify educational diversity's status as a compelling interest. Other points of law are also unsettled:

- Is "promoting *racial* diversity" a compelling interest?
  - Justice Powell's opinion in *Bakke* states that promoting a generally diverse student body is compelling, not that racial diversity per se is compelling.
  - Should racial diversity be advanced as a compelling interest? How might this claim be established?

- Is "a strong basis in evidence" necessarily required to establish diversity as a compelling governmental interest?
  - The courts have set the standard in remedial cases, but it has not been clearly held to be required in non-remedial cases.
  - If "strong basis in evidence" is not the standard, what is the appropriate standard?

- Assuming that a "strong basis in evidence" is required, what particular evidence is necessary to satisfy the requirement in a diversity case?

- Are certain types of studies - e.g., surveys, experiments, qualitative studies - more persuasive than other types of studies?
- Should the courts require campus-specific evidence for each admissions or financial aid policy that may be challenged?
- Are there any distinctions among universities that might make a legal difference (e.g., data collected from private universities versus data collected from public universities, or data collected at the undergraduate level versus data collected at the professional or graduate level)?

B. "REMEDYING THE PRESENT EFFECTS OF PAST DISCRIMINATION"

1. Current State of the Law

The courts have uniformly held that remedying the present effects of past discrimination can constitute a compelling interest under a strict scrutiny analysis. In doing so, however, the courts have established high evidentiary standards and have paid close attention to the linkages between the past acts of discrimination and the present effects of the discrimination. While an institution may have a compelling interest in remedying its own past discrimination, the U.S. Supreme Court has rejected remedying *societal* discrimination as a compelling interest. (*City of Richmond v. J.A. Croson Co.*)

Courts require a **"strong basis in evidence"** that race-conscious measures are needed to remedy past discrimination and its present effects. Typically, historical evidence of discriminatory policies, documentary or testimonial evidence of discriminatory intent, and prior findings of discrimination by the courts can be introduced to help demonstrate past discrimination. Evidence showing significant statistical disparities - particularly severe minority underrepresentation - and evidence documenting ongoing problems such as a racially hostile environment can be introduced to help demonstrate the present effects of discrimination. The evidence should also show a clear linkage between the past discrimination and the present effects. Courts have found effects arising from general societal discrimination to be insufficient.

The courts also carefully examine the **source of discrimination** to ensure that the remedial measure is used to combat the present effects of past discrimination perpetrated by the **specific governmental actor** seeking to employ the remedial measure. (*Wygant v. Jackson Board of Education*) In *Hopwood v. Texas*, for example, the Fifth Circuit looked to the actions of the state law school for evidence of discrimination, not the actions of the state university system as a whole or to the actions of the state. The court found arguments that the state had discriminated in its elementary and secondary schools unpersuasive as justification for the law school's admissions policy. While the court recognized that the state law school could be directed by these other entities to implement a remedial policy, these entities could only do so because of past wrongs at the law school.

2. Evidence from the University

The courts require a "strong basis in evidence" to show the need to remedy the present effects of past discrimination. However, the standards are not entirely clear, and there does not

appear to be a clear division between the burden of proving past discrimination and the burden of proving present effects. Courts tend to conflate the two elements, or at least view the same evidence as possible proof of both. It may be advantageous, however, to delineate and show (1) past discrimination, (2) present effects, and (3) a nexus between the two, even though most courts have not required an explicit three-step approach.

Historical Evidence. Documentary and testimonial evidence showing previous discriminatory policies and discriminatory intent can be powerful evidence of past discrimination. Anecdotal evidence can be introduced, but it should not be isolated. The courts also look at the relationship between the historical discrimination and the present effects. Courts may find that policies too remote in time are not responsible for causing the present discriminatory effects.

Statistical Disparity Studies. Courts have found statistical studies to be useful, but the studies must focus on the proper representative pool. For example, in demonstrating statistical disparities between the numbers of minority and non-minority students admitted to a university, the appropriate pool to examine is the pool of minimally qualified applicants, not the population at large. The courts also examine the connection between the past discrimination and the present statistical disparities. For example, in *Wessman v. Gittens*, a case involving selective K-12 admissions, the First Circuit assumed that an achievement gap between minority and non-minority students could be a vestige of past discrimination, but found that the school did not present satisfactory evidence of a causal connection.

Prior Judicial Findings. A court's prior determination that a governmental entity has committed discrimination in the past can be important evidence, but it is not dispositive. For instance, the First Circuit has held that the mere fact that a government institution was once found to have practiced discrimination is insufficient by itself to satisfy a state actor's "burden of producing the reliable evidence required to uphold race-based action." (*Wessman v. Gittens*)

Ongoing Discriminatory Effects. Evidence of ongoing problems within an institutional setting can support a court's finding of present effects. For example, evidence of a hostile environment for racial minorities within the institution or evidence of an institution's bad reputation in minority communities can provide some support for present effects. However, this type of evidence by itself may not be sufficient unless it is linked to past discrimination and it is combined with other evidence. (*Podberesky v. Kirwan*)

3. Questions in the Law

- What is the appropriate "governmental unit" responsible for past discrimination?
    - The Fifth Circuit's holding in *Hopwood* that the governmental unit was the law school, rather than the university system or the state, is a narrow interpretation of the U.S. Supreme Court's ruling in *Wygant v. Jackson Board of Education*. The use of the term "governmental unit" could be interpreted to mean a university system or the state. The Supreme Court has not explicitly adopted the Fifth Circuit's reading and could interpret the term more broadly in an educational setting.

- Can an educational institution take remedial action because it was a **"passive participant"** in discrimination?
    - Justice O'Connor's plurality opinion in *City of Richmond v. J.A. Croson Co.* suggested that if a government actor was a "passive participant" in a system of racial exclusion by a local industry, then it could "take affirmative steps to dismantle such a system," relying on its authority to eliminate private discrimination within its own jurisdiction. Passive participation theory might be applied in an educational setting where the state is responsible for the university and for remedying discrimination in the K-12 sector; however, the theory has yet to be tested before the U.S. Supreme Court.

NARROW TAILORING

The narrow tailoring requirement is designed to test the "fit" between a compelling governmental interest and the policy adopted to satisfy that interest. The courts evaluate whether a race-conscious policy is necessary to achieve the compelling interest, and examine alternative policies that are race-neutral or less burdensome on non-minority students.

1. Current State of the Law

There is no single test for narrow tailoring. In non-remedial cases, courts have looked to Justice Powell's *Bakke* opinion to evaluate whether an admissions program is narrowly tailored to an interest in promoting a diverse student body. In remedial cases, the courts may look to a separate body of case law based on affirmative action cases in employment or contracting, such as *United States v. Paradise* and *City of Richmond v. J.A. Croson Co.* In either setting, the courts will look carefully at race-neutral alternatives.

a. Narrow Tailoring and Remedial Interests. In remedial cases outside of higher education, the courts have often relied on a set of narrow tailoring factors offered by Justice Brennan in ***United States v. Paradise***, a U.S. Supreme Court case upholding a court-ordered promotions policy designed to remedy discrimination in public employment. Using the *Paradise* factors, a court examines:

- **the necessity for the relief and the efficacy of alternative remedies**
- **the flexibility and duration of the relief, including the availability of waiver provisions**
- **the relationship of numerical goals to the relevant market, and**
- **the impact of the relief on the rights of third parties**

The factors may be weighed against each other, and some of the factors may be considered more carefully in a particular case because of the nature of the policy and the strength of the interest.

Another basis for a narrow tailoring analysis comes from *Wygant v. Jackson Board of Education* and *City of Richmond v. J.A. Croson Co.* In those cases, the Court raised the necessity of having a **"logical stopping point"** for a race-based program to be narrowly tailored. This factor is similar to the second *Paradise* factor above. If the program is narrowly tailored to

remedying past discrimination by the university, there must be a clear point at which the program will end. For instance, the Fourth Circuit found that the University of Maryland's race-conscious scholarship program was not narrowly tailored, partly because the court was concerned about how a university could determine when enough "remedying" had occurred to render a program superfluous. (*Podberesky v. Kirwan*)

However, a stopping point may not necessarily be required in non-remedial settings. As the district court in *Gratz v. Bollinger* noted: "unlike the remedial setting, diversity in higher education, by its very nature, is a permanent and ongoing interest." (Compare this ruling, though, with the district court's ruling in *Grutter v. Bollinger*, in which the district court struck down a non-remedial policy on the grounds that, among other things, there was no logical stopping point on the use of race.)

The courts may also examine whether a remedial program is **overinclusive** or **underinclusive.** For example, if the goal of a program is to remedy the present effects of an institution's past discrimination against African Americans, a court may strike down a program that includes other minorities such as Latinos and Asian Americans (who may only recently have entered the applicant pool), because the program is overinclusive and not narrowly tailored to remedying the previous discrimination.

a. Diversity-Based Policies and *Regents of the University of California v. Bakke*. Justice Powell's opinion in *Bakke* offered specific guidelines for determining whether a diversity-based admissions policy is narrowly tailored. In striking down the University of California, Davis medical school's admissions policy, Justice Powell rejected (1) race-based quotas or setting aside a specified number of seats for minority applicants, and (2) reviewing minority applications under a process entirely separate from the process for other applicants. Justice Powell suggested that an appropriate use of race would be similar to the Harvard College undergraduate admissions program, which looked to race as a **"plus" factor** and allowed every applicant the opportunity to compete for every seat in the class.

Some general principles to analyze race-conscious admissions policies stem from Justice Powell's *Bakke* opinion:

- There must be no rigid quota or a functional equivalent in the form of a set aside or predetermined number of seats for minorities.
- Minority applicants should not be reviewed under a separate admissions track that insulates them from non-minority applicants.
- Race should be one of several possible plus factors to be considered; other factors may include unique life experiences, challenges, interests or talents, socioeconomic disadvantage, or geography.
- Each applicant must be treated as an individual rather than a stand-in for a favored group.
- No specific racial or ethnic group should be singled out by the program; rather, the program should look to all racial and ethnic groups as contributing to genuine diversity.

For example, in *Gratz v. Bollinger*, the district court upheld an undergraduate admissions policy at the University of Michigan that employed race in two ways: (1) assigning underrepresented minority applicants twenty points on a selection index score because of race,

and (2) allowing admissions officers to "flag" a minority applicant for consideration in a general admissions pool if that applicant could not pass an initial admissions threshold. The court found that the university's policies typified a "plus" system that employed a flexible use of race and still allowed non-minority students to be considered in ways similar to minority students.

The *Gratz* court found unconstitutional, however, an earlier admissions policy at Michigan that offered "protected" space for minority candidates - as well as for in-state residents, athletes, foreign applicants, and ROTC candidates - during a rolling admissions process. Under that program, a number of protected spaces were reserved in the overall pool of admittees, and spaces were used up as members of a protected group were admitted over the admissions season. The court characterized the protected space as an insulation of minority applicants from competition from non-minorities and as the functional equivalent of a quota. The University has appealed this part of the ruling.

In the Michigan law school case, *Grutter v. Bollinger*, the district court held that an individualized, whole-file review admissions policy was not narrowly tailored because, among other things, it failed to adequately define a "critical mass" of minority students needed within the student body (i.e., more than just a token number), there was no time limit on the use of race, there was no logical basis for the selection of particular racial and ethnic groups to be categorized as underrepresented, and the admissions policy, as interpreted by the judge, amounted to a quota system. Although the admissions policy did not set any numerical goals on the admission of students, and the judge interpreted testimony that recounted historical trends in minority admissions as evidence of an unwritten policy in which the law school sought a minimum percentage of minority admittees. The case is on appeal to the Sixth Circuit.

Recently, the Eleventh Circuit in *Johnson v. Board of Regents* developed a new narrow tailoring test, based on the *Paradise* fac[illegible]s. The court examined:

- **whether the policy uses race in a rigid or mechanical way that does not take sufficient account of the different contributions to diversity that individual candidates may offer;**
- **whether the policy fully and fairly takes account of race-neutral factors which may contribute to a diverse student body;**
- **whether the policy gives an arbitrary or disproportionate benefit to members of the favored racial groups; and**
- **whether the school has genuinely considered, and rejected as inadequate, race-neutral alternatives for creating student body diversity**

The court ruled that the University of Georgia's admissions policy, which awarded bonus points to minority applicants, was inflexible and failed to give sufficient weight to non-racial admissions factors; the court also found that the university had failed to consider any form of non-racial alternative prior to adopting its race-conscious policy.

2. Evidence from the University

The courts can evaluate a university admissions policy by relying on some or all of the following:

- documentary evidence and testimony from university officials about the development of the policy
- the details of the policy itself, including its history, the activities of the individuals charged with its implementation, and statistical data describing results over time
- the effectiveness of the policy in meeting the university's stated interest, which could include information on whether the university periodically evaluates and revises its policy

At a minimum, the policy should be narrowly tailored to advance the actual interest articulated by the university. In *Podberesky v. Kirwan*, the Fourth Circuit struck down the University of Maryland's Banneker scholarship program for African American students because the court believed the program furthered a different objective from the one it claimed to remedy. The suggested interest was remedying the underrepresentation of qualified black students from Maryland. However, the program was designed to attract only high-achieving black students, even though the alleged discrimination was against all black students, not just high achievers. In addition, the court found that the program was overinclusive because scholarships were available to non-Maryland residents.

Alternative University Policies. Under any test of narrow tailoring, the courts examine alternative policies to determine whether race-neutral policies might accomplish the same compelling governmental interest. The courts have not been clear, however, about how much is required of a governmental actor to show that a race-neutral alternative could substitute for its race-conscious policy. Must a race-neutral policy already have been tried and failed? Some courts have suggested that a governmental entity must have at least considered an alternative policy, while other courts look prospectively at whether a race-neutral policy would be just as effective as a race-conscious policy.

In *Gratz v. Bollinger*, the district court used a prospective approach and rejected the plaintiff's argument that a random selection process would produce a diverse student body. The court relied on evidence from the University's expert witnesses and made the following findings:

- statistical evidence showed that a race-neutral admissions program would substantially reduce the number of minority students;
- the probability of acceptance for minority students would be cut dramatically, while non-minority students would see only a very small positive effect on their probability of admission;
- a system relying entirely on test scores would lead to the rejection of a number of qualified minority applicants;
- a race-neutral percentage plan, such as the University of Texas program that admits all students who finish in the top 10% of their high school class, would not be as effective in enrolling an academically well prepared and diverse student body;
- income-based strategies are ineffective; and
- the university had already tried vigorous minority recruitment programs, all of which had been unsuccessful

3. Questions in the Law

- Should the *Paradise* factors apply in non-remedial cases?
  - The second *Paradise* factor focuses on the planned duration of the policy, but when the goal is the educational benefits flowing from a diverse student body, it is unclear whether it makes sense to have a "logical stopping point."
  - The third *Paradise* factor is based on a labor pool analysis and it is unclear what the analogous pool in higher education would be. The *Podberesky* court suggests that it may be the applicant pool of the previously discriminated group, but no non-remedial case has addressed this factor.

- What evidence must universities provide to show the ineffectiveness of an alternative race-neutral policy?
  - Courts that have looked at affirmative action in public employment have taken at least three approaches:
    1) the governmental actor must have at least considered alternatives before implementing a race-conscious policy; otherwise, a program is not narrowly tailored;
    2) the court assesses prospectively whether an alternative could effectively accomplish the same interest; if the alternative could not accomplish the same interest, the current policy is narrowly tailored;
    3) the court examines an actor's prior use of alternatives and assesses the success or failure of those prior attempts; if the prior attempts were unsuccessful, the current policy is narrowly tailored.

Citations:

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